

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

AD HOC COALITION FOR WILLAPA
BAY,

Appellant,

v.

WASHINGTON STATE DEPARTMENT
OF ECOLOGY; and WILLAPA
BAY/GRAYS HARBOR OYSTER
GROWERS ASSOCIATION,

Respondents.

PCHB NO. 05-093

ORDER GRANTING SUMMARY
JUDGMENT

This matter comes before the Pollution Control Hearings Board (Board) on a Motion for Summary Judgment filed by Respondent Willapa Bay/Grays Harbor Oyster Growers Association (Oyster Growers), and concurred in by co-respondent Department of Ecology (Ecology). Appellants Ad Hoc Coalition for Willapa Bay (Coalition) are challenging a modification to NPDES Permit No. WA0040975 issued by the Ecology. The Oyster Growers are asking the Board to uphold the modification to the permit and dismiss this appeal on summary judgment.

The Board was comprised of Chair Bill Clarke and Member William H. Lynch.¹ Administrative Appeals Judge, Kay M. Brown presided for the Board. Larry Warnberg represented the Coalition. Joan M. Marchioro, Senior Assistant Attorney General, represented

¹ The third position on the Board is currently vacant.

Ecology. Samuel W. "Billy" Plauche, Attorney, represented the Oyster Growers.

In rendering its decision, the Board considered the following submittals:

1. Order Denying Motion for Stay of NPDES Permit No. WA0040975;
2. Respondent Willapa Bay/Grays Harbor Oyster Growers' Motion for Summary Judgment;
3. Declaration of Janet L. Boyd with Exhibits 1 through 5;
4. Declaration of Steven R. Booth, Ph.D. with Attachment 1;
5. Ecology's Response to Willapa Bay/Grays Harbor Oyster Growers Association's Motion for Summary Judgment;
6. Appellant's Response to Motion for Summary Judgment; and,
7. Respondent Willapa Bay/Grays Harbor Oyster Growers' Reply in Support of Motion for Summary Judgment

Having fully considered the record in this case and being fully advised, the Board enters the following ruling.

Facts

NPDES Permit No. WA004090975 was initially approved in May 2002. The permit allowed for the application of the pesticide carbaryl to control burrowing shrimp on oyster beds in Willapa Bay and Gray's Harbor. *Boyd Decl.*, p. 2. It was appealed to this Board by the Coalition, along with another Appellant, the Washington Toxics Coalition.² The private parties

² A motion for a stay of the permit was filed. A majority of the Board granted the stay. *Washington Toxics Coalition and Ad Hoc Coalition for Willapa Bay v. Ecology, Willapa Bay/Grays Harbor Oyster Growers Association and Farm & Forest Helicopter Services, Inc.*, PCHB No. 02-083 (Initial Order Partially Granting Motion for Stay of NPDES Permit No. WA0040975, July 5, 2002). It was appealed to Thurston County Superior Court. The Court reversed the stay and remanded to the Board for a decision on the merits of the appeal. *Willapa/Grays Harbor Oyster Growers Association v. PCHB, Washington Toxics Coalition and Ad Hoc Coalition for Willapa Bay, Ecology, and Farm & Forest Helicopter Services, Inc.*, No. 02-2-01141-9 (Thurston Co. Superior Court, July 19, 2002)(Order Granting Motion to Lift Stay).

1 in that appeal reached a settlement prior to the hearing, and the appeal was withdrawn.
2 *Washington Toxics Coalition and Ad Hoc Coalition for Willapa Bay v. Ecology, Willapa*
3 *Bay/Grays Harbor Oyster Growers Assoc., and Farm & Forest Helicopter Services*, PCHB No.
4 02-083 (Order of Dismissal, May 6, 2003). Ecology was not a party to this settlement.

5 NPDES Permit WA 0040975, as approved, contained requirements and conditions for the
6 use of carbaryl. The permit also required monitoring, the submission of an annual operations
7 plan, and the completion of several studies. One required study was of the sediment impact
8 zone. The purpose of the study was to determine the impact on sediment of carbaryl treatments.
9 The permit required three sampling sites for the sediment study, two in Willapa Bay and one in
10 Grays Harbor. Study results were to be submitted by January 2005. *Boyd Decl. and Ex. 1.*

11 On June 23, 2004, in a letter to Ecology, the Oyster Growers requested modification of
12 the sediment impact zone study required by Condition S5.E of the permit. Specifically, they
13 sought a reduction in the number of test areas for the study from three sites to one, and proposed
14 that the one site be studied in more detail. They also requested an extension of the due date for
15 the sediment study from January 1, 2005, to January 1, 2006. *Boyd Dec. and Ex. 2.*

16 The Oyster Growers met with Ecology to discuss the requested modifications. Following
17 those discussions, Ecology prepared a Statement of Basis for the proposed modification, drafted
18 proposed modifications to the permit, and prepared a notice of the proposed modification.

19 Ecology then mailed a packet of material to interested parties on December 3, 2004. It also
20

1 published notice in three newspapers that circulate in the Willapa Bay/Grays Harbor area. The
2 list of interested parties included the Coalition and several of its members. Ecology accepted
3 public comment until January 28, 2005. *Boyd Decl. and Exs. 3 & 4.*

4 Ecology received 18 comment letters, including one from the Coalition. Ecology
5 reviewed the comments and drafted responses to them. The proposed modification was not
6 changed in response to the comments, and a modified permit was approved on June 10, 2005.
7 *Boyd Decl. and Exs. 4 & 5.* The modified permit reduced the sampling sites from three to one,
8 and extended the date for submission of the study results from January 2005 to January 2006.

9 On June 17, 2005, the Coalition filed an appeal of Ecology's approval of a modification
10 to NPDES Permit No. WA0040975 issued on June 10, 2005. It is this appeal that is currently
11 before the Board. Along with the appeal, Appellant filed a motion for a stay of the effectiveness
12 of the permit. The Board denied the stay by order issued on June 15, 2005. *Ad Hoc Coalition*
13 *for Willapa Bay v. Ecology, and Willapa Bay/Grays harbor Oyster Growers Association*, PCHB
14 No. 05-093 (Order Denying Motion for Stay of NPDES Permit No. WA0040975, June 15,
15 2005)("Order Denying Stay). In this order, the Board concluded that the Coalition had failed to
16 establish a likelihood of success on the merits of its challenge to the permit modification.

1 The Oyster Grower's have now filed a motion for summary judgment on the two³ issues
2 raised in the appeal. These issues are

- 3 1. Did the public notice and comment process used by Ecology in processing
4 the challenged modification to NPDES Permit No. WA 0040975 comply
with applicable regulations?
- 5 2. Do the Sediment Impact Zone study protocols implemented in the
6 challenged modification to NPDES Permit No. WA 0040975 comply with
applicable regulations?

7
8 Analysis

9 A. Summary Judgment Standard

10 Summary judgment is a procedure available to avoid unnecessary trials on formal issues
11 that cannot be factually supported and could not lead to, or result in, a favorable outcome to the
12 opposing party. *Jacobsen v. State*, 89 Wn. 2d 104, 108, 569 P.2d 1152, 1155 (1977). The party
13 moving for summary judgment must show there are no genuine issues of material fact, and the
14 moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co.,*
15 *Inc.*, 131 Wn. 2d 171, 182; 930 P. 2d 307, 313 (1997). A material fact in a summary judgment
16 proceeding is one affecting the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d
17 451, 456, 824 P. 2d 1207, 1210 (1992). The trier of fact must construe the evidence and consider
18 the material facts and all reasonable inferences therefrom in the light most favorable to the

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20 ³ A third issue initially raised by the Coalition was whether Ecology failed to enforce the permit deadlines contained
21 in NPDES Permit No. WA 0040975. Appellants have conceded that the Board does not have jurisdiction over this
issue. See Coalition's Response to Motion for Summary Judgment, pp. 3-4. Therefore, this issue is dismissed.

1 nonmoving party. *Weatherbee v. Gustafson*, 64 Wn. App. 128, 131, 822 P. 2d 1257 (1992). If
2 the moving party is a respondent and meets this initial showing, then the inquiry shifts to the
3 party with the burden of proof at trial. If, at this point, the non-moving party fails to make a
4 showing sufficient to establish the existence of an element essential to that party's case, and on
5 which that party will bear the burden of proof at trial, then the trial court should grant the motion.
6 *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182, 187(1989).

7 Here, the Board concludes that there are no contested issues of material fact, and
8 therefore, this matter can be decided on summary judgment.

9 B. Public Notice and Comment Process

10 WAC 173-220-190(3) governs the notice and comment process applicable to a permit
11 modification. It states:

12 The department shall modify or revoke permits only after public notice and opportunity
13 for public hearing as provided in this chapter in those instances where changes are
14 proposed which lessen the stringency of effluent limitations. In all other instances, the
15 form of public notice and public participation, if any, shall be determined by the
16 department on a case-by-case basis according to the significance of the proposed action.

17 The Coalition argues that in this situation the Department was required to provide public
18 notice and a hearing because the proposed modification would lessen the stringency of effluent
19 limitations. They contend that the modification, which changed the protocols applicable to a
20 required sediment impact zone study (from three sample sites to one) and extended the due date
21 for the study by one year, constitutes a lessening of stringency of effluent limitations. The key
22 problem with the Coalition's argument is that the permit contains no sediment impact limitations.

1 Therefore, it is hard to contend that the limitations have been lessened, if they didn't exist in the
2 first place.

3 The Coalition responds with a more subtle argument that the purpose of the sediment
4 study is to provide data to be used in future permits for effluent limits. If, as they claim, the data
5 obtained from a modified study isn't as complete as it would have been, and therefore misses
6 information related to impacts, it could result in less stringent discharge limitations in the future.

7 The Board is not persuaded by the Coalition's argument for two reasons. First, if a future
8 permit is not stringent enough in its effluent limitations, the permit should be challenged when it
9 is issued. What is at issue in this case is the modification to the sediment study protocols in the
10 existing permit. As already pointed out, the permit at issue does not contain a sediment impact
11 limitation.

12 Second, the evidence in the record on this motion does not support the Coalition's
13 argument that the modification will weaken the study. Dr. Steven R. Booth stated in his
14 declaration in support of the motion for summary judgment that there is little additional benefit
15 in analyzing three oyster beds instead of one. *Booth Decl., pp. 3, 4*. This is because there is a
16 large number of oyster beds (1698 Gibbs-numbered beds in Willapa Bay alone), and the variety
17 in the composition of the sediments differs in all of them. Instead he opines that a more rigorous
18 qualitative study of one site will lead to a more precise description of a sediment impact zone.
19 Further, he indicates that the site chosen contains a high silt content, where carbaryl is expected
20 to persist in the greatest quantities, making the study a "worst case scenario" study. The

Coalition offers no evidence in response to the Oyster Grower's Summary Judgment to contradict this evidence.⁴

The Board concludes that the approved permit modification does not lessen the stringency of effluent limitations, and, therefore, the type and form of public process to be used in reviewing the modification was left to the discretion of Ecology.⁵ The notice process used by Ecology was appropriate, and the Board grants summary judgment to the Respondents on this issue.

C. Sediment Impact Zone Study

The second issue raised by the Coalition is that the sediment impact zone study protocol, as modified, does not comply with applicable regulations.⁶ In their motion for a stay, the Coalition argued the modification did not comply with WAC 173-204-320(1)(c). They do not, however, repeat this argument in their response to the Oyster Growers motion for summary judgment.⁷ Instead, the Coalition argues that the modified protocol violates subsection E (3) of Special Condition S5 of the Permit. This provision states:

⁴ Mr. Warnberg did include in his own declaration submitted in support of the motion for a stay, hearsay statements from Ecology's scientist Tom Gries that the modifications to the sampling protocol were intended to reduce the reliability and validity of the sampling data. Even if this declaration is considered as part of the record for the summary judgment motion, it still encounters the same problems the Board identified in the stay order: The statement is hearsay, it is made by a scientist that Ecology relied upon to support the modification, and it is contradicted by a direct opinion offered by an expert. Order on Stay, p. 6.

⁵ Further, Ecology did conduct a fairly extensive notice process including direct mailing of information to interested parties and publication of notice in three newspapers that circulate in the Willapa Bay/Grays Harbor area. The notice generated 18 comment letters, including one from the Appellants in this case.

⁶ This issue is identified as Issue No. 3 in the pre-hearing order.

⁷ In the Order Denying Stay, the Board concluded the Appellants were not likely to succeed on this argument based on the evidence submitted with their stay motion. Order on Stay, p. 5. Appellants have not submitted any new

1 The proposed study identifies a representative carbaryl application site plus unexposed
2 reference stations and a reasonable number of surface sediment samples to be collected
3 on a periodic basis at a frequency to be determined from each application and reference
4 site. All parties must agree that these samples are adequate for determining the
5 magnitude, spatial extent and persistence of adverse biological effects. . . .

6 *Boyd Declaration, Ex. 4, p. 13 (emphasis added).*

7 The Coalition contends that it was a party to the development of the permit, and agreed to
8 the original sediment study protocol. Therefore, the argument goes, the study protocol should
9 not be modified without their agreement. Although the Board understands the Coalition's desire
10 to participate in the modification process, as a strictly legal matter, the Board agrees with the
11 Oyster Growers that the Coalition is not a "party" to the NPDES permit. The permit is a
12 regulatory document issued by Ecology to the Oyster Growers. Members of the public, while
13 having an interest in the permit, are not "parties" to the permit.⁸ The requirements for
14 modification of the permit are set out in the regulations. *See* WAC 173-220-150(1)(d)(allowing
15 modification of the permit for good cause.) The Coalition does not argue that the regulatory
16 requirements for modification have not been met. The Board concludes that the agreement of the
17 Coalition is not a necessary requirement for the modification of this NPDES permit. Summary
18 judgment is granted to the respondents on this issue.

19 Based on the foregoing analysis, the Board enters the following

20 evidence pertaining to this argument in their response to the summary judgment motion. Therefore, the Board's
21 prior analysis on this point remains unchanged.

⁸ The Coalition and the Oyster Growers did enter into a settlement as a way to resolve the prior appeal of this
NPDES permit. That settlement agreement, while potentially binding on the Oyster Growers as parties to the
agreement, is not enforceable in this forum. *Northwest Aquatic Eco-Systems v. Ecology*, PCHB No. 04-126 (Order
Granting Summary Judgment, February 1, 2005).

ORDER GRANTING
SUMMARY JUDGMENT
PCHB NO. 05-093

ORDER

The Respondents' summary judgment motion is granted, and this appeal is dismissed.

DONE this 1st day of November 2005.

POLLUTION CONTROL HEARINGS BOARD

Bill Clarke, Chair

William H. Lynch, Member

Kay M. Brown, Presiding
Administrative Appeals Judge